No. 75-1578

In the Supreme Court of the United States

OCTOBER TERM, 1976

LOUIE L. WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION, STATE OF FLORIDA, PETITIONER

v.

JOHN SYKES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Rule 3.190(i) of the Florida Rules of Criminal Procedure provides that a motion to suppress any confession or admissions must be made prior to trial, unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion. This case presents the question whether a defendant who failed to make a timely pretrial motion to suppress a post-arrest statement on the grounds that it was obtained in violation of *Miranda* v. *Arizona* may raise the claim in a habeas corpus proceeding pursuant to 28 U.S.C. 2254.

INTEREST OF THE UNITED STATES

The case raises an important issue regarding the availability of federal habeas corpus when a defendant has failed to comply with a procedural rule requiring that objections to the admissibility of statements be made prior to trial. Rule 12(b)(3) of the Federal Rules of Criminal Procedure, which was promulgated by this Court and enacted into law by Congress, contains a provision similar to the Florida rule. The holding of the court of appeals, permitting respondent to challenge the admissibility of his confession despite his failure to raise the claim in the manner prescribed by the state rule, is based on principles generally applicable to habeas corpus applications. The decision in this case accordingly will control the availability of collateral relief to federal prisoners who raise similar claims for the first time by motion under 28 U.S.C. 2255 and seek to avoid the procedural bar of Rule 12. The interest of the United States in the resolution of this issue is apparent.

RULES INVOLVED

Rule 3.190 of the Florida Rules of Criminal Procedure (33 F.S.A., p. 265 (1975)) provides in pertinent part:

> (i) *Motion to Suppress a Confession or Admissions Illegally Obtained.*
>
> (1) *Grounds.* Upon motion of the defendant or upon its own motion, the court shall suppress any confession or admission obtained illegally from the defendant.

(2) *Time for Filing.* The motion to suppress shall be made prior to trial unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion or an appropriate objection at the trial.

(3) *Hearing.* The court shall receive evidence on any issue of fact necessary to be decided in order to rule on the motion.

Rules 12(b)(3) and 12(f) of the Federal Rules of Criminal Procedure provide:

(b) *Pretrial Motions.* Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial:

* * * * *

(3) Motions to suppress evidence; * * *

* * * * *

(f) *Effect of Failure to Raise Defenses or Objections.* Failure by a party to raise defenses or objections or to make requests which must be made prior to trial, at the time set by the court pursuant to subdivision (c), or prior to any extension thereof made by the court, shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver.

STATEMENT

1. On January 18, 1972, an information was filed by the State Attorney for the Twelfth Judicial District of

Florida charging John Sykes, the respondent herein, with second degree murder, in violation of 22 F.S.A. 782.04 (1964). Specifically, the information alleged that on January 8, 1972, respondent "did unlawfully kill WILLIE GILBERT by an act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, by unlawfully making an assault on the said WILLIE GILBERT with a deadly weapon * * *."

Trial commenced on June 5, 1972. The evidence at trial quite plainly established that the respondent, John Sykes, killed Willie Gilbert with a shotgun on January 8, 1972. The issue at the trial centered on the circumstances surrounding the events of that day and the question whether the homicide was committed in self-defense.

The Case-in-Chief. The principal witnesses for the State were the law enforcement officers who responded to a call to investigate a homicide at respondent's mobile home at approximately 7:40 on the evening of January 8, 1972. The first to arrive at the scene were Deputy Sheriffs Skinner and Grethan.

Deputy Skinner testified that when he arrived at the scene he found Willie Gilbert lying on the ground in the yard, near his car and approximately ten feet in front of respondent's trailer (Tr. 42–43). While Skinner was examining the body, respondent's wife, who "was pretty well shook up [and] hysterical" (Tr. 24), came up to him and stated that respondent had

shot Gilbert (Tr. 44). Respondent then came across the road and said to Deputy Skinner: "I shot Willie" (Tr. 45). Respondent was then placed under arrest, and Mrs. Sykes retrieved the 12-gauge shotgun and shell casing from the trailer (Tr. 45–46).

Shortly thereafter, at approximately 8:20 or 8:30, p.m., respondent was questioned at the DeSoto County Jail (Tr. 47). After being advised of his rights, and apparently after giving a false exculpatory statement suggesting that Willie Gilbert had shot himself with the shotgun accidently while "tussling with it" (Tr. 17),[1] respondent admitted that he had shot Willie Gilbert. Respondent said that Gilbert came to his trailer and was playing around with his gun; he told Gilbert to put the shotgun down, "so Willie put it down and went into the yard." Respondent said that he followed him out to the yard and "that Willie turned around and patted his butt at him like this and (I shot him)" (Tr. 48).

On cross-examination, Deputy Skinner was questioned in detail about the circumstances surrounding the confession. Specifically, Deputy Skinner related that he had advised respondent "what he was under arrest for" and read from a card the following statement (Tr. 54–55):

> You have the right to remain silent. If you do say something we can and will use it against you in a Court of law. You have the right to

[1] This exculpatory statement was testified to by another law enforcement officer who was present for only part of the interrogation (Tr. 16–17). For some reason not apparent in the record, neither Deputy Skinner nor Deputy Grethan, who were doing the interrogating (Tr. 47), testified to this statement.

> any attorney and to have him present at any time you wish to talk to us. If you cannot afford an attorney, one will be furnished free of charge before we question or talk to you. You may just stop answering or discussing the matter at any time. Do you understand what I have told you? Do you wish to talk to us now without a lawyer?

According to Deputy Skinner, respondent indicated that he did not want a lawyer and said that "he wanted to talk to us" (Tr. 55), although he was unwilling, after telling the officers what happened, to sign a written statement (Tr. 35).

Respondent's counsel elicited from Deputy Skinner the fact, which had also been elicited from other witnesses (Tr. 39), that respondent was under the influence of alcohol at the time of his arrest (Tr. 55). No motion was made, however, either prior to or during trial, to suppress Skinner's testimony regarding respondent's statements.

The other evidence in the prosecution's case-in-chief was largely corroborative of Deputy Skinner's narrative (Tr. 35–37). Moreover, the prosecution, apparently anticipating a defense based on self-defense, attempted to show that Willie Gilbert was not armed and that no weapons were found on him or in the area of the yard where he was lying (Tr. 15, 21, 33, 44). On the other hand, respondent's lawyer attempted through his cross-examination to lay the groundwork for the defense case that was to come. Not only did he elicit the fact that the deceased

and the respondent had both been intoxicated at the time of the shooting (Tr. 24, 28, 38, 48, 59), but he brought out that respondent had a jagged cut between his thumb and his forefinger (Tr. 18), a wound that respondent would testify (Tr. 65–66, 70) he had received in a pre-shooting scuffle with Willie Gilbert (who he said had a knife in his hand). A doctor who was called to the scene of the crime testified, however, that it did not appear to him that the wound was caused by a sharp blade (Tr. 59).

The Defense. The respondent testified that he and his wife had arrived home about six o'clock on the evening of January 8, 1972, and that he had been drinking a little bit during the day (Tr. 62). After they got home, and while respondent was having dinner, Willie Gilbert, who was a friend and sometime employer of respondent, came to his house looking for his wife. Respondent said that he told Gilbert that he had not seen Gilbert's wife for weeks. Gilbert then accused respondent of lying (Tr. 62–63), whereupon, according to respondent, the following events took place (Tr. 63–65):

> He went from the living room and picked up the gun.
>
> He came down. He said, "That is the way I want it." He was talking to me, he said, "You stopped working for me and went to working for a cracker." I said, "I don't owe you anything. I can work for who I wants to."
>
> He said, "You ain't going to work for a cracker." When I stood up he backed up with

> the gun. He said, "I'll blow your God-damn brains out, you and your wife." I said, "I ain't do you like that."
>
> * * * * *
>
> [W]hen I jumped from the table I ran into him. He came around with the gun. I caught the gun. He reached back trying to get this knife, and that is the time Willie went over to the refrigerator. He jumped out the door. He said, "You mother fucker, I am going to show you something." He ran from the house. I stepped over to the utility door and opened the screen door and shot him. I told my wife to go call the law because I shot him. She said, "You are joking." I said, "I ain't." I sat down to the table to eating. My wife went and I went to see that my wife called the law.

In response to questions by his attorney, respondent explained that, at the time he fired the shot, Gilbert was coming back toward him (Tr. 66):

> Q. Was Willie heading toward you?
>
> A. He was coming back. He come back running.
>
> Q. Did you think he had a gun or a weapon?
>
> A. He told me, "Wait, you God-damn son-of-a-bitch, you wait until I come back, I will show you something." I didn't give him a chance to go out there and come back on me.
>
> Q. Had Willie threatened you before?
>
> A. No, sir.

The respondent also testified that he knew that Willie Gilbert carried a shotgun and that he had believed that his life was in danger at the time he shot Gilbert (Tr. 69). Respondent admitted, however, that

it was he who had a prior conviction for aggravated assault with a pistol and for subsequent unlawful possession of a firearm (Tr. 74–75), although he testified that he was employed at the time of Gilbert's slaying and had been out of trouble since his release (Tr. 71–73).

Respondent's wife then took the stand in an effort to corroborate some of his testimony, although she did not see Gilbert when the shotgun went off (Tr. 82). Moreover, she did not hear any of the conversation that immediately preceded the shooting (Tr. 91). Several other witnesses, mainly friends of respondent, were also called to show that Gilbert had in the past carried a shotgun (Tr. 100) and a pistol (Tr. 106) and had threatened to use a firearm against them or persons related to them.

2. After being instructed on the elements of the crime and of the defense of self-defense, the jury convicted the defendant of the lesser included offense of third degree murder, *i.e.*, the unintentional killing of another without premeditated design to effect death, in the commission of a felony other than certain specified serious offenses. On June 5, 1972, after his motion to set aside the verdict, arrest judgment and obtain a new trial was denied, respondent was sentenced to imprisonment for a term of ten years. He then appealed to the Second District Court of Appeal of Florida assigning six separate grounds of error, none of which related to the admission of his post-arrest statements. The conviction was affirmed, and certiorari was denied by the Supreme Court of Florida (A. 24).

Respondent thereafter filed a motion to vacate the judgment of conviction pursuant to Fla. R. Crim. P. 3.850. The motion, which apparently raised the issue regarding the admissibility of his post-arrest statements, was denied without any published opinion (A. 24; A. 40–41). Subsequently respondent filed a motion for a writ of habeas corpus in the Second District Court of Appeal of Florida. This application was denied in a brief *per curiam* opinion on the apparently erroneous ground that the issue had been raised and decided on the direct appeal from the judgment of conviction. *Sykes* v. *State,* 275 So. 2d 24. A similar petition was filed in the Supreme Court of Florida and was denied without a published opinion (A. 40).

3. On April 25, 1973, respondent filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Florida (A. 35–46). The petition alleged that the statements made by him to the deputy sheriffs were improperly admitted at trial because respondent was intoxicated at the time he made them and was therefore incapable of understanding the *Miranda* warnings that had been given (A. 24–25). However, respondent expressly waived "any contention or allegation as regards ineffective assistance of counsel" at his trial (A. 47).

The district court held that the failure of the respondent to raise the issue regarding the admissibility of the post-arrest statements did not bar habeas corpus relief. The court observed that "[i]n exceptional circumstances, some strategic decisions at trial can preclude an accused from later asserting a constitutional

claim on federal habeas corpus," but it found no such circumstances in this case (A. 26). The district court apparently did not consider the effect of Fla. R. Crim. P. 3.190, which requires assertion of such claims prior to trial. Because the trial record was incomplete on the issue whether respondent understood the *Miranda* warnings, the district court agreed to stay its determination of the habeas corpus petition on the condition that a full blown hearing on the issue of the voluntariness of the confession, as prescribed by *Jackson* v. *Denno,* 378 U.S. 368, be afforded respondent by the State of Florida (A. 29–30). The district court certified the case to the Court of Appeals for the Fifth Circuit, however, to permit review of the interlocutory order (A. 32), and the court of appeals agreed to hear the appeal (A. 4).

4. The court of appeals affirmed the order of the district court and directed the State to conduct a hearing within 90 days to determine "whether Sykes was properly apprised of his *Miranda* rights, and understood and knowingly waived those rights at the time he made the incriminating statements used against him" (A. 18). The route taken by the court of appeals to reach this conclusion is not entirely clear.

The court began its opinion by observing that generally, before a confession or admission is allowed into evidence, "it is incumbent upon the trial judge to determine the voluntariness of the statements involved, and the defendant's knowing and intelligent waiver of his constitutional rights" (A. 8–9) and that

a defendant "is entitled to a hearing on the issue of voluntariness as a matter of procedural due process" (A. 9). The court then observed that in Florida "[t]he burden is on the State to secure this prima facie determination of voluntariness [by the trial judge], not upon the defendant to demand it" (A. 9–10), although of all the Florida cases cited to support this conclusion, only one case, *Stiner* v. *State,* 78 Fla. 647, 83 So. 565, decided almost a half-century prior to the adoption of Fla. R. Crim. P. 3.190, actually so held. Indeed, one of the cases cited by the court of appeals, *Dodd* v. *State,* 232 So. 2d 235, 238, clearly suggests that a timely objection is a prerequisite to obtaining appellate review of the admissibility of a confession.

Having thus defined "the nature of the right" (A. 7), the court of appeals then considered the effect of Rule 3.190(i)(2), which requires a defendant to make a motion to suppress evidence prior to trial "unless opportunity therefore did not exist or the defendant was not aware of the grounds for the motion," although "the court in its discretion may entertain the motion or an appropriate objection at the trial" (A. 5). The court of appeals held that Rule 3.190 would not bar habeas corpus relief in the absence of a deliberate bypass by the defendant or a tactical decision by counsel to forgo the objection. Moreover, the court distinguished this case from *Davis* v. *United States,* 411 U.S. 233, which held that the failure to make a timely challenge to the racial makeup of the grand jury, as required by Fed. R. Crim. P. 12(b)(2), pre-

cluded a petition for a writ of habeas corpus. It stated that "[a] major tenet of the *Davis* decision was that no prejudice was shown to petitioner through the loss, or waiver, of his rights to challenge jury composition," while "in a case such as the present one, involving the admissibility of a confession or incriminating statement, prejudice to the defendant is inherent" (A. 14, 15).

The court of appeals concluded by again taking note of the trial judge's failure *sua sponte* to compel the State to show that the post-arrest statements were admissible (A. 17). It observed that had he done so the respondent "would have been on notice as to the waiver of his rights, and Rule 3.190(i) might now foreclose him from bringing additional or subsequent arguments regarding the admissibility of the statement in question" (A. 17). Accordingly, "[b]ecause the trial afforded appellee in this case did not conform to procedural requirements, long established, that the trial judge must assure himself of the admissibility of the criminal defendant's statements, we refuse to construe Rule 3.190(i) as foreclosing Sykes' opportunity to challenge the voluntariness of the statements admitted, and the concomitant waiver of *Miranda* rights" (A. 17).

SUMMARY OF ARGUMENT

This case involves the right of a state prisoner to complain in a habeas corpus proceeding under 28 U.S.C. 2254 about the admissibility of post-arrest statements made by him, which were admitted at his

trial without objection, and which had allegedly been obtained without procuring the knowing and intelligent waiver of rights required by *Miranda* v. *Arizona*, 384 U.S. 436, to make the statements admissible at trial. Because the State of Florida, where respondent stood trial and was convicted, has enacted a procedural rule requiring such issues to be raised by motion prior to trial and refuses to consider them when presented for the first time on appeal or in a collateral proceeding, the question squarely raised is the extent to which it is appropriate for a federal district court to grant habeas corpus relief, based on this kind of claim, in the face of such a state procedural bar.[2]

1. The proper standard for assessing the availability of federal habeas corpus in such circumstances is not, as the court of appeals held, whether the respondent "deliberately by-passed" or "understandingly and knowingly" waived his right to object to the admissibility of such statements (see *Fay* v. *Noia*, 372 U.S. 391, and *Johnson* v. *Zerbst*, 304 U.S. 458),

[2] The opinion of the court of appeals appears to rest in some measure on its construction of Fla. R. Crim. P. 3.190(i) as not "foreclosing [in circumstances here] Sykes' opportunity to challenge [in a habeas corpus proceeding] the voluntariness of the statements admitted, and the concomitant waiver of *Miranda* rights" (A. 17). The courts of Florida, however, have held that the failure to raise this issue in a timely fashion constitutes a waiver foreclosing appellate review (Pet. Br. 8–9), and that an issue, if "known to the defendant at the time of trial," cannot be raised in a collateral proceeding. *State* v. *Matera*, 266 So. 2d 661, 666 (Fla. Sup. Ct.). Moreover, they have likewise declined to consider respondent's applications for collateral relief. Under these circumstances, the court of appeals' view of Florida law seems plainly mistaken.

but whether he has shown "cause" sufficient to justify the extraordinary relief he seeks. This more rigorous standard was established by *Davis* v. *United States,* 411 U.S. 233, which held that the requirement of Rule 12, Fed. R. Crim. P., that certain claims be raised before trial barred collateral relief even though there had been no knowing and deliberate waiver by the defendant of his pretrial right to object to the composition of the grand jury that indicted him; the same standard was applied to Section 2254 review of state convictions in *Francis* v. *Henderson,* 425 U.S. 536. It governs this case.

We further submit that, even apart from the impact of the Florida procedural rule explicitly requiring pretrial submission of claims for suppression of evidence, the prosecution should not be required to show a knowing and deliberate waiver in order to bar consideration in collateral attack proceedings of such claims when they have not been raised at trial. *Zerbst* involved the waiver of the right to the assistance of counsel at trial, and *Fay* involved a failure to preserve by appeal the right to attack the voluntariness of an allegedly coerced confession that provided the sole evidence upon which the defendant had been convicted. The rights being "waived" in both cases, especially the former, cut directly to the heart of the fairness of the trial proceedings. Both cases involved interests considerably different from the interests served by the *Miranda* rules, and this difference justified freer access to collateral inquiry into the validity of the convictions.

In the case of *Miranda* claims, however, we are dealing with rules that are not principally designed to protect the integrity of the trial itself, but rather to protect the rights of arrested persons not to be compelled by custodial interrogation to incriminate themselves. Accordingly, the "knowing and deliberate waiver" standard has its place in relation to the custodial interrogation itself and is manifested in *Miranda's* requirement that statements made in response to such interrogation are admissible only if preceded by such a waiver. No logical purpose is served by requiring in addition a knowing and deliberate waiver of the right to object at trial to the admission of statements that may have been obtained in violation of *Miranda.*

2. In the instant case, the court of appeals suggested that "cause" justifying relief from the procedural bar of the state rule was shown both because the trial judge failed *sua sponte* to require the State to justify the admission of the confession before admitting it into evidence at trial and because respondent was prejudiced by its admission in the sense that the confession may have affected the verdict.

This analysis is wrong. There is no constitutional obligation on a trial judge to raise the issue of the admissibility of post-arrest statements. "Under our adversary system, once a defendant has the assistance of counsel the vast array of trial decisions, strategic and tactical, which must be made before and during trial rests with the accused and his attorney. Any other approach would rewrite the duties of trial

judges and counsel in our legal system." *Estelle* v. *Williams,* 425 U.S. 501, 512.

As for the fact that the post-arrest statements may have affected the verdict, if that is to be held sufficient "cause" to overcome respondent's procedural default, then the salutory objectives of procedural requirements such as the Florida rule involved here and Rule 12(b)(3) of the Federal Rules of Criminal Procedure will be completely undermined. One of the principal purposes such rules serve is to encourage objections to be made at a time when the commission and investigation of a crime are sufficiently recent that it will be possible for law enforcement officials to find evidentiary substitutes if in fact a confession is suppressed. Another purpose is to insure that the claim for suppression of evidence will itself be determined at a time when memories are relatively fresh and information concerning the circumstances of the government's procurement of the challenged evidence is readily available. These policies are defeated when an objection is first made after trial and often years after the commission of the offense. In such a case, a defendant should be required to show not simply that the evidence was potentially useful to the jury, but that the challenged confession was involuntary and that its admission, because of the unreliability of such confessions, may have contributed to the conviction of an innocent man. See *Jenkins* v. *Delaware,* 395 U.S. 213.

This approach is consistent with the holding of the Court in *Davis* v. *United States, supra,* where the

Court refused to *presume* prejudice in the case of a procedural default regarding a claim of racial discrimination in the selection of a grand jury, but required a showing of actual prejudice. Similarly, here the Court should decline to indulge the *Miranda* presumption of coercion, but should instead condition access to habeas corpus relief upon a showing that respondent's post-arrest statements were involuntary in fact.

3. Indeed, we believe it is appropriate to go somewhat further. Because respondent here seeks extraordinary relief from a reasonable state procedural rule, he should be required to show not only that the confession was involuntary, but that it may have contributed to an erroneous verdict. Our submission is that the test on collateral attack for determining whether a defendant should be relieved of a procedural default of the kind at issue here should not be whether the district court affirmatively called the issue to the attention of the defendant, or whether the evidence may have affected the result, but whether the admission of the evidence may have caused the punishment of an innocent man.

Such an approach insures that the writ of habeas corpus remains available to one who is unjustly confined, while giving effect to the salutary purposes of procedural rules such as the Florida rule at issue here. Moreover, while the writ has been expanded to provide "'a quasi-appellate review function, forcing trial and appellate courts in both the federal and state system to toe the constitutional mark'" (*Stone* v.

Powell, No. 74–1055, decided July 6, 1976, dissenting opinion of Brennan, J., p. 19, quoting *Mackey* v. *United States,* 401 U.S. 667, 687), that consideration is not violated where a defendant fails to call any alleged constitutional violation to the attention of the trial judge although he had been afforded an opportunity to do so.

There is here no claim that the confession was involuntary and no suggestion that an innocent man may have been convicted. Moreover, because the prosecution's case-in-chief was so strong even without respondent's post-arrest statements, respondent had to take the stand if he was to make any defense at all. At that point his statements could have been used to impeach his credibility. Under these circumstances, respondent's lawyer, who made detailed inquiries into the manner in which the statements were obtained, may have simply decided to forgo a formal objection that would have little practical value to the defense. Should it now be held that habeas corpus relief is nevertheless available, there will be little incentive for future defendants in cases such as this to raise the issue at trial.

ARGUMENT

I. THE STANDARD TO BE APPLIED HERE IS NOT WHETHER RESPONDENT "DELIBERATELY BY-PASSED" OR "UNDERSTANDINGLY AND KNOWINGLY" WAIVED HIS OBJECTION TO THE ADMISSION OF THE CONFESSION, BUT WHETHER THERE IS CAUSE TO EXCUSE HIS PROCEDURAL DEFAULT

1. The threshold issue presented here concerns the standard that must be applied in determining whether

respondent is precluded by his procedural default from challenging the admissibility of his confession. The court of appeals held that where, as here, a defendant had been prejudiced by the admission of the challenged evidence, he would not be barred from raising the issue unless there had been a deliberate by-pass or a knowing and intelligent waiver of his objection to the admissibility of the confession. We respectfully submit that this standard is wrong.

In *Davis* v. *United States,* 411 U.S. 223, the defendant had failed prior to trial to challenge the method of selection of the grand jury that indicted him, although Fed. R. Crim. P. 12(b)(2) required that such motions be made prior to trial or they would be deemed waived. The defendant argued, nevertheless, that "because his § 2255 motion alleged deprivation of a fundamental constitutional right," Rule 12(b)(2) was not controlling. "Accordingly, he urge[d] that his collateral attack on his conviction may be precluded only after a hearing in which it is established that he 'deliberately by passed' or 'understandingly and knowingly' waived his claim of unconstitutional grand jury composition" (411 U.S. at 236).

This Court rejected the argument and held that, although the waiver standard relied upon by the defendant might have been appropriate in the absence of a procedural rule like Rule 12(b)(2), in which Congress has specifically provided that such claims must be raised timely or be deemed waived, the explicit provision of the rule took precedence over "a

particular doctrine of waiver [which had been] applied by this Court in interpreting the [habeas corpus] statute" (411 U.S. at 242).

Accordingly, the Court refused to apply the "deliberate by-pass or knowing waiver" standard that had been previously applied in determining the availability of habeas corpus relief as to issues that had not been timely raised or properly preserved (*ibid.*):

> We think it inconceivable that Congress, having in the criminal proceeding foreclosed the raising of a claim such as this after the commencement of trial in the absence of a showing of "cause" for relief from waiver, nonetheless intended to perversely negate the Rule's purpose by permitting an entirely different but much more liberal requirement of waiver in federal habeas proceedings. We believe that the necessary effect of the congressional adoption of Rule 12(b)(2) is to provide that a claim once waived pursuant to that Rule may not later be resurrected, either in the criminal proceedings or in federal habeas, in the absence of the showing of "cause" which the Rule requires. We therefore hold that the waiver standard expressed in Rule 12(b)(2) governs an untimely claim of grand jury discrimination, not only during the criminal proceeding, but also later on collateral review.

When the same issue arose in *Francis* v. *Henderson*, 425 U.S. 536, which involved a belated challenge by a state prisoner to the racial composition of the grand jury in the face of a state procedural bar similar to that of the federal rules, the Court held that "[i]f, as

Davis held, the federal courts must give effect to these important and legitimate concerns [underlying a procedural rule like Fed. R. Crim. P. 12], then surely considerations of comity and federalism require that they give no less effect to the same clear interests when asked to overturn state criminal convictions" (*id.* at 541).

After *Davis* was decided, this Court promulgated and Congress affirmatively approved an amendment to Rule 12 of the Federal Rules of Criminal Procedure (Rule 12(b)(3)) bringing motions to suppress evidence within the category of motions that must be made prior to trial or be deemed waived (416 U.S. 1003; Federal Rules of Criminal Procedure Amendments Act of 1975, Pub. L. 94–64, Section 2, 89 Stat. 370). This action quite plainly makes the construction of Rule 12 in *Davis* applicable equally to petitions for collateral review commenced by federal prisoners who did not timely raise suppression motions. Accordingly, the holding in *Francis* v. *Henderson, supra,* would compel a federal court to give similar preclusive effect to the provisions of a comparable state procedural rule. Significantly, the Florida rule involved here was in fact modeled in part after former Rule 41 of the Federal Rules, which required a motion to suppress illegally seized evidence to be made prior to trial.[3] *Committee Notes,* 33 F.S.A., p. 267 (1975).

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[3] The provisions of former Rule 41 were incorporated in the amendment to Fed. R. Crim. P. 12 discussed above. See *United States* v. *Mauro*, 507 F. 2d 802 (C.A. 2), certiorari denied, 420 U.S. 991.

Davis and *Francis* thus substantially undermine the support that might otherwise be derived for the court of appeals' decision from an expansive reading of *Fay* v. *Noia*, 372 U.S. 391, and *Henry* v. *Mississippi*, 379 U.S. 443. *Fay* is of course distinguishable from the instant case (and from *Davis* and *Francis*) in that it did not involve a failure by the defendant to comply with a state procedural rule requiring a timely objection to evidence or to some irregularity in the institution of the proceedings; instead, it was concerned with assessing the impact of a defendant's failure to appeal upon the availability of federal habeas corpus. There are significant differences between the two kinds of procedural default. The failure to make a pretrial objection may irretrievably prejudice the prospects both of accurately determining the merits of the objection and, where the objection is found to be meritorious and evidence is excluded, of adducing other probative evidence in lieu of the suppressed evidence (since such other evidence could often be found and presented at the time of trial but will be undiscoverable or lost when a conviction is set aside at a later date). See discussion at pp. 37–40, *infra*. On the other hand, when a timely objection is made and the matter is adjudicated at or before trial, the risk of prejudice is appreciably lessened, and the adverse consequences for the administration of justice from a failure to appeal are correspondingly reduced.

Fay is also distinguishable in terms of the nature of the constitutional claim there under considera-

tion—that the defendant had been convicted of murder solely on the basis of a confession that was involuntary in fact and therefore without probative value. It may well be that federal habeas corpus should be available to review claimed constitutional defects that may have led to the conviction of an innocent person even though a state (or federal) statute or rule would otherwise erect a procedural barrier to consideration of the claim. See pp. 41–43, *infra*; cf. *Stone* v. *Powell*, No. 74–1055, decided July 6, 1976.

Henry is in some ways more directly comparable to the instant case because, although it reached this Court on direct review rather than habeas corpus, it concerned the effect to be given the state rule requiring contemporaneous objection to the admission of evidence alleged to have been illegally seized. Thus, in contrast to *Fay*, both *Henry* and the instant case involve comparable procedural rules, and both involve the use of probative, but arguably excludible, evidence at trial. While *Henry*'s holding (that a state procedural rule could bar direct Supreme Court review when counsel have deliberately by-passed an available objection for tactical reasons) is of limited pertinence to the present case, it seems fair to say that an underlying assumption of both the majority opinion and Mr. Justice Harlan's dissent was that the state procedural rule would not serve to bar federal habeas corpus review (although the dissenters plainly believed that it should). But, of course, this assumption was not a holding in *Henry*, and it is entirely incompatible with

the subsequent development of the law on this point, as reflected by *Davis* and *Francis*.

2. Indeed, we believe that, even without a procedural bar such as Fed. R. Crim. P. 12, there is no sound basis for applying the stringent *Johnson* v. *Zerbst*[4] voluntary waiver standard used by the court of appeals. As Judge Friendly has aptly observed, such a standard was "wholly appropriate" in that case because "[t]he sixth amendment, [as construed by the Court in *Johnson* v. *Zerbst*], required the provision of counsel; none has been provided; therefore the writ should issue unless the defendant had waived his right." Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments,* 38 U. Chi. L. Rev. 142, 159 (1970) (hereafter cited as "Friendly"). Judge Friendly continued by noting that similar standards should not be applied to the use at trial of the fruits of improper interrogation or illegal search (*id.* at 159–160):

> The Constitution protects against compelled self-incrimination; thus an incriminating statement made under compulsion cannot be used over timely objection unless before answering the defendant had waived his privilege not to speak. It protects also against unreasonable searches; if there has been a search of a home without a warrant, the fruits thus cannot be used over objection unless the defendant has consented to the search. But it is a serious confusion of thought to transpose this doctrine of substantive law into the courtroom. At that

[4] 304 U.S. 458, 464.

> stage the defendant's constitutional right is to have a full and fair opportunity to raise his claims on trial and appeal and the assistance of counsel in doing so. There is no need to find a "waiver" when the defendant or his counsel has simply failed to raise a point in court, since the state has not deprived him of anything to which he is constitutionally entitled.[5]

The reasoning is apposite here. While the incriminating statement made by respondent under the "compulsion" of custodial interrogation could not have been used at trial in the face of a timely objection, unless the prosecution could demonstrate that before answering respondent had knowingly waived his right to remain silent, his right in his prosecution was simply to have a full and fair opportunity to raise his claims at trial and on appeal and to enjoy the assistance of counsel in doing so. Where, as here, he plainly was afforded such an opportunity by the pertinent state procedural rules and failed to take advantage of it, it cannot reasonably be said that his trial was conducted in such a manner as to deprive him of any right to which he was entitled. Cf. *Estelle* v. *Williams*, 425 U.S. 501.

This distinction between the standards to be applied in assessing the sufficiency of a waiver of the constitutional right itself as compared to the waiver of a

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[5] The implication in this passage that the Constitution might be construed to require a knowing and intelligent waiver to support a consent search was not borne out by this Court's decision in *Schneckloth* v. *Bustamonte*, 412 U.S. 218.

possible trial right to obtain exclusion of evidence is particularly appropriate in the present context, where respondent's claim is that his interrogation denied him the "procedural safeguards" *Miranda* prescribed "to insure that the right against compulsory self-incrimination was protected." *Michigan* v. *Tucker*, 417 U.S. 433, 444. Normally, the privilege against self-incrimination is deemed to be waived unless the defendant refuses to speak because of his fear of self-incrimination. *United States* v. *Kordel*, 397 U.S. 1. While the special nature of custodial interrogation has led to a rule under which a statement made without advice or waiver of *Miranda* rights is potentially inadmissible, the judicially created remedy for *Miranda* violations is simply to permit a defendant to secure exclusion of his statements at trial. It surely does not follow that a defendant and his attorney should be relieved of the necessity for raising the claim when the statement is used against him.

In the present case, however, the Court need not completely accept the foregoing analysis, which we acknowledge is inconsistent with certain language in *Fay* v. *Noia*, *supra*, 372 U.S. at 439–440, in order to decide in the State's favor, because here there is a procedural rule that requires the timely assertion of any objection to the admissibility of evidence, and *Davis* v. *United States*, *supra*, and *Francis* v. *Henderson*, *supra*, make it plain that in such circumstances the strict *Johnson* v. *Zerbst* waiver standard is not applicable.

II. THERE ARE NO SPECIAL CIRCUMSTANCES PRESENT HERE THAT EXCUSE RESPONDENT'S PROCEDURAL DEFAULT

Fla. R. Crim. P. 3.190(i)(2) provides in pertinent part that a motion to suppress a statement or admission "shall be made prior to trial unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion or an appropriate objection at the trial." While the rule gives the trial court discretion to entertain a timely objection "at the trial," there is no indication that this discretion extends to a collateral attack on the judgment of conviction. This is so not only because of the wording of Rule 3.190(i), but also because Fla. R. Crim. P. 3.850, which "was adopted from, and is essentially verbatim, § 2255 of Title 28 of the U.S. Code * * *" (*State* v. *Matera*, 266 So. 2d 661, 662), has been construed by the Supreme Court of Florida to preclude a defendant from obtaining collateral relief "[i]f the matter forming the basis of a motion to vacate was known to the defendant at the time of trial * * * whether the matter was litigated at trial * * * or withheld and not litigated at trial" (*id.* at 666).

While this procedural bar appears to be more stringent than Fed. R. Crim. P. 12(f), which permits a district court judge to grant relief from its waiver provisions for "cause", federal courts are not compelled to honor an "airtight" waiver rule of the kind which Florida applies (*Francis* v. *Henderson*, *supra*, 425 U.S. at 538–539). Accordingly, the issue raised is whether there are any special circumstances present

here that would warrant relieving respondent from his procedural default.

Although the court of appeals did not approach the case in this way, it nevertheless cited two considerations that it obviously considered to be sufficient to excuse the default. The first of these was the failure of the trial judge *sua sponte* to question the admissibility of the statements and to require "the prosecution to show they were admisible." The court of appeals reasoned that if the trial judge had done this "appellee would have been on notice as to the waiver of his rights" (A. 17). Second, the court of appeals also found compelling the fact that the respondent was prejudiced by the allegedly erroneous admission of the statements, and it concluded that this too provided a basis for distinguishing *Davis* and relieving respondent from the consequences of his procedural default.

We believe that neither of these considerations constitutes sufficient cause to relieve respondent in a federal habeas corpus proceeding of the consequences that Florida has chosen to attach to a procedural default of this nature.

A. THE TRIAL COURT WAS UNDER NO OBLIGATION, ABSENT A TIMELY OBJECTION, TO COMPEL THE STATE TO SHOW THAT THE POST-ARREST STATEMENTS WERE PROPERLY OBTAINED

There is no dispute here that respondent had ample opportunity to challenge the admissibility of his statements either prior to or at trial and that he was aware, or should have been aware, of the grounds for the motion. The deputy sheriffs who testified

were interrogated specifically by respondent's trial counsel about the warnings that were given and the respondent's response to those warnings. Moreover, defense counsel elicited the fact that respondent was intoxicated at the time of his arrest (see, p. 6, *supra*). Thus, respondent's waiver could not be excused on either of the grounds provided by the Florida procedural rule.

Nor do we believe that a federally created excuse may be constructed on the theory that the trial court was under some affirmative obligation to ask the defendant whether he objected to the admission of the statements. Indeed, any doubt about this issue would seem to have been resolved only last Term in *Estelle* v. *Williams*, *supra*. There, the Chief Justice observed for the Court (425 U.S. at 512):

> Nothing in this record, therefore, warrants a conclusion that respondent was compelled to stand trial in jail garb or that there was sufficient reason to excuse the failure to raise the issue before trial.[9] Nor can the trial judge be faulted for not asking the respondent or his counsel whether he was deliberately going to trial in jail clothes. To impose this requirement suggests that the trial judge operates under the same burden here as he would in a situation in *Johnson* v. *Zerbst*, 304 U.S. [458] (1938), where the issue concerned whether the accused willingly stood trial without the benefit of counsel. Under our adversary system, once a defend-

[9] It is not necessary, if indeed it were possible, for us to decide whether this was a defense tactic or simply indifference. In either case, respondent's silence precludes any suggestion of compulsion.

> ant has the assistance of counsel the vast array of trial decisions, strategic and tactical, which must be made before and during trial rests with the accused and his attorney. Any other approach would rewrite the duties of trial judges and counsel in our legal system.

Accord: *United States* v. *Mitchell*, 540 F. 2d 1163, 1169–1170 (C.A. 3) (Stern, J., concurring).

The court of appeals in the instant case stated, however, that "[t]he trial judge, before receiving the admissions or confessions of a defendant must hold an evidentiary hearing outside the presence of the jury to determine if it was voluntarily made. * * * This is a prerequisite to the introduction of the evidence; and the opportunity to have such a hearing is a pre-requisite to any assertion of waiver because of the defendant's failure to object" (A. 17).

The only authority cited by the court of appeals for its suggestion that there was an affirmative duty on the part of the trial judge himself to question the admissibility of this evidence is *Jackson* v. *Denno*, 378 U.S. 368. That decision will not bear the weight placed upon it by the court of appeals. The case simply had nothing to do with the obligation of a trial judge spontaneously to raise a challenge to the admissibility of a defendant's confession. Rather, it dealt with the quite different question of the proper procedures for adjudicating a coerced confession claim that had been duly raised by the defense.

Moreover, even if *Jackson* were now to be extended by this Court to impose upon the trial judge an obliga-

tion to raise *sua sponte* the isue of the voluntariness of a confession, it would by no means follow that such an obligation should extend to possible *Miranda* objections to a confession not attacked as involuntary in fact. In this case respondent has not challenged the voluntariness of his statements under the traditional standard, and we are aware of nothing in the record to suggest that his confession was involuntary under that standard.[6] Moreover, the isue of voluntariness is not coterminous with the issue whether *Miranda* has been complied with; a determination that a confession was voluntary will not justify its admission if *Miranda* was not complied with. See 384 U.S. 457; *Johnson* v. *New Jersey*, 384 U.S. 719, 728–730. Accordingly, whatever may be the respective obligations of court and counsel with respect to voluntariness issues of the kind presented in *Jackson*, the law on the point affords no basis for relieving a defendant of the effects of a waiver arising from a failure to raise a *Miranda* claim.

B. THE FACT THAT ADMISSION OF THE POST-ARREST STATEMENTS MAY HAVE AFFECTED THE VERDICT DOES NOT JUSTIFY RELIEVING RESPONDENT OF HIS PROCEDURAL DEFAULT

In *Davis* v. *United States*, *supra*, the Court rejected the argument of the petitioner, and the view of the

[6] The fact that respondent may have been intoxicated at the time he made the statements in question would not normally affect their admissibility on voluntariness grounds. See generally Annotation. *Confession While Intoxicated*, 69 A.L.R. 2d 361 (1960); *United States* v. *Martin*, 434 F.2d 275 (C.A. 5); but cf. *Intoxicted Confessions: A New Haven in Miranda?;* 20 Stan. L. Rev. 1269 (1968).

dissenting Justices (411 U.S. at 255), that the concept of "cause" sufficient to provide relief from a procedural default should incorporate the *Johnson* v. *Zerbst* voluntary and knowing waiver standard. Instead, it held that the district court had properly concluded that no "cause" was shown to grant relief from the waiver provisions of Rule 12(f) where the facts underlying the claim of illegal composition of the grand jury were a matter of public record and could easily have been ascertained prior to trial, and where no specific prejudice was shown to the defendant as a result of the alleged illegal composition of the grand jury that had indicted him.

The court of appeals here cited the language, approved in *Davis,* that " 'it is entirely proper to take absence of prejudice into account in determining whether a sufficient showing has been made to warrant relief from the effect of the Rule' " (411 U.S. at 244, quoting from *Shotwell Mfg. Co.* v. *United States,* 371 U.S. 341, 363) and concluded that the present case was distinguishable from *Davis* on this point. This was so because "in a case such as the present one, involving the admissibility of a confession or incriminating statement, prejudice to the defendant is inherent" (A. 15).

We submit that the court of appeals misread and misapplied the holding in *Davis.* Applied in the federal context, the court's statement means that the waiver provision of Fed. R. Crim. P. 12(f) has no application to claims regarding the admissibility of evidence unless the admission of the evidence was

harmless (in which event it would not be necessary to review the merits of the claim in the first place). We believe that such a reading of Rule 12(f), which would render wholly meaningless the mandate of Rule 12(b)(3) that evidentiary suppression motions be made before trial, is plainly erroneous and contrary to the obvious and salutory purpose of provisions such as Rule 12 of the Federal Rules and Rule 3.190(i) of the Florida rules. See *United States* v. *Mauro,* 507 F. 2d 802 (C.A. 2), certiorari denied, 420 U.S. 991.

Furthermore, the analysis in *Davis* of the extent to which "prejudice" must be taken into account as *a factor* in determining whether a habeas corpus petitioner should be relieved of the consequences of his procedural default essentially supports the position we urge here. The claim in *Davis* was one of racial discrimination against Negroes in the selection of the grand jury that indicted a Negro defendant. Although there are other interests at stake where a claim involving jury discrimination is made, the principal direct prejudice to the defendant is the possibility that an indictment or conviction will be based on racial prejudice. *Peters* v. *Kiff,* 407 U.S. 493, 498–499. While it is clear that not every indictment returned by a grand jury, or conviction by a petit jury, from which Negroes are excluded is motivated by racial prejudice, considerations of policy justify presuming such prejudice where a timely objection is made. Where, however, there has been a procedural default, and the issue is raised for the first time in a collateral proceeding, *Davis* held that

the absence of a showing of actual prejudice (*i.e.*, actual racial discrimination) justified the denial of relief from the procedural default. As the Court observed in *Davis* (411 U.S. at 245):

> The presumption of prejudice which supports the existence of the right is not inconsistent with a holding that actual prejudice must be shown in order to obtain relief from a statutorily provided waiver for failure to assert it in a timely manner.

Moreover, it is apparent that the "actual prejudice" to which the Court in *Davis* alluded as a factor justifying relief from the procedural default, reflects the kind of occurrence that would raise a serious due process issue going to basic considerations of fairness in the criminal process. See *Peters* v. *Kiff*, *supra*, 407 U.S. at 501.[7]

The analysis employed in *Davis* leads to the conclusion here that the respondent has not shown cause to be relieved of his procedural default. The error about which he complains is the admission of his statements although they may have been obtained without compliance with the procedural rules prescribed in *Miranda*. "[T]hese procedural safeguards [are] not themselves rights protected by the Consti-

[7] This was, in fact, the "actual prejudice" that the district court judge in *Davis* found to be absent when he observed that the defendant was indicted with two white accomplices, that the government's case was a strong one, and that "[t]he government did not require the assistance of racial prejudice in order to obtain an indictment against petitioner, and indeed petitioner does not contend that any such prejudice existed" (*Davis* v. *United States*, *supra*, No. 71-6481, October Term 1972, Sup. Ct. App. 25).

tution but were instead measures to insure that the right against compulsory self-incrimination was protected." *Michigan* v. *Tucker*, 417 U.S. 433, 444. Without abandoning the premise that a statement voluntarily made is admissible at trial, the Court in *Miranda* instituted a presumption of involuntariness where the suspect makes a statement without first having been fully advised of and having knowingly waived his right to counsel and his right to remain silent.

Miranda's presumption of involuntariness is analogous to the presumption of prejudice indulged when racial discrimination has infected the composition of a grand jury. And just as every indictment returned by an improperly constituted grand jury is not necessarily the product of actual racial bias, so every statement obtained without procuring a proper *Miranda* waiver is not necessarily involuntary or unreliable in fact. See *Johnson* v. *New Jersey*, *supra*, 384 U.S. at 729–730. The *Miranda* presumption simply reflected the Court's unwillingness, for reasons of judicial policy,[8] to continue the case-by-case analysis required by the traditional voluntariness test, particularly in view of its general "finding" regarding the practices commonly employed in custodial interrogation (see 384 U.S. at 454–455).

Accordingly, where a timely objection is made, "the presumption of prejudice" (*i.e.*, that the statement is

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[8] See Kamisar, *A Dissent From The Miranda Dissents: Some Comments On The "New" Fifth Amendment And The Old "Voluntariness" Test*, 65 Mich. L. Rev. 59, 99–104 (1966).

involuntary) that "supports the existence of the right" to the procedure mandated in *Miranda* will suffice to warrant the exclusion of a confession not obtained in conformity with *Miranda*. Here, however, there was no timely objection, and just as the Court in *Davis* was not prepared to accept the "presumption of prejudice" that supports the procedural right there at issue (a properly selected grand jury), so here the Court should not accept the "presumption of prejudice" that supports the procedural rights prescribed by *Miranda*. In short, at the very minimum, the prejudice that a defendant should be required to show to obtain relief from the waiver imposed by the state rule is that his confession was in fact involuntary.

This analysis is also supported by the holding in *Jenkins* v. *Delaware*, 395 U.S. 213, which involved the issue whether a defendant who had been convicted before *Miranda* was decided, but whose conviction was reversed on other grounds after the decision in *Miranda*, could object on *Miranda* grounds to the admission of a post-arrest statement at his retrial. Although the Court had previously held that *Miranda* would be applied to all trials commenced after the date of the decision (*Johnson* v. *New Jersey*, *supra*), it distinguished the retrial at issue in *Jenkins* from the situation with which it had dealt in *Johnson*.

After observing that, "in an effort to extend the protection of *Miranda* to as many defendants as was consistent with society's legitimate concern that convictions already validly obtained not be needlessly aborted," *Johnson* held *Miranda* applicable only to

trials commenced after the date *Miranda* was decided (395 U.S. at 219). The Court continued (*id.* at 219–220):

> Implicit in this choice was the assumption that, with few exceptions, the commission and investigation of a crime would be sufficiently proximate to the commencement of the defendant's trial that no undue burden would be imposed upon prosecuting authorities by requiring them to find evidentiary substitutes for statements obtained in violation of the constitutional protections afforded by *Miranda*.

However, this critical "assumption" is not operative at a retrial, which may take place many months, if not years, after the crime had been committed. Accordingly, the Court continued (395 U.S. at 220):

> This same concern for the justifiable reliance of law enforcement officials upon pre-*Miranda* standards militates against applying *Miranda* to retrials, which would place a much heavier burden upon prosecutors to compensate for the inadmissibility of incriminating statements obtained and admitted into evidence pursuant to practices not previously proscribed. See, *e.g.*, *State* v. *Vigliano, supra; People* v. *Sayers,* 22 N.Y. 2d 571, 240 N.E. 2d 540 (1968); Comment, The Applicability of *Miranda* to Retrials, 116 U. Pa. L. Rev. 316, 324–325 (1967). As we stated in *Stovall,* "[I]nquiry would be handicapped by the unavailability of witnesses and dim memories." 388 U.S., at 300. The burden would be particularly onerous where an investigation was closed years prior to a retrial because law enforcement officials relied in good faith upon a

> strongly incriminating statement, admissible at the first trial, to provide the cornerstone of the prosecution's case.

The same considerations are present where a defendant who has not made a timely objection at trial commences a habeas corpus proceeding after his conviction has become final. The law enforcement officers, who may have relied on his unchallenged confession as "the cornerstone" of their case, will be faced with the "onerous" burden of attempting to reopen an investigation long since closed in an effort to rehabilitate the case. Conversely, if a timely objection had been made and sustained, at a time when "the commission and investigation of a crime would be sufficiently proximate to the commencement of the defendant's trial," then "no undue burden would [have] be[en] imposed upon prosecuting authorities by requiring them to find evidentiary substitutes for statements obtained in violation of the constitutional protections afforded by *Miranda*." Indeed, this is one of the principal policies underlying procedural rules like Fla. R. Crim. P. 3.190(i). Another reason for the rule is the difficulty of meeting a claim of noncompliance with *Miranda* years after the conviction.[9] As Judge Friendly has observed (Friendly, *supra*, 38 U. Chi. L. Rev. at 147):

> The longer the delay, the less the reliability of the determination of any factual issue giving

[9] These are not the only considerations that justify a requirement of timely objection. See Chief Judge Kaufman's thoughtful opinion in *United States* v. *Mauro*, *supra*, 507 F. 2d at 805–806.

> rise to the attack. It is chimerical to suppose that police officers can remember what warnings they gave a particular suspect ten years ago, although the prisoner will claim to remember very well. Moreover, although successful attack usually entitles the prisoner only to a retrial, a long delay makes this a matter of theory only.[10]

This is not to say that a defendant who failed to make a timely objection to the admissibility of a confession is necessarily to be left without recourse if he can establish actual prejudice—that is, that the confession obtained was truly involuntary. As the Court observed in *Jenkins*, the defendant there could still "invoke a 'substantive test of voluntariness which, because of the persistence of abusive practices, has become increasingly meticulous . . ., [taking] specific account of the failure to advise the accused of his privilege against self-incrimination or to allow him access to outside assistance.' 384 U.S., at 730. As a result, not applying *Miranda* to retrials will not preclude the invocation of 'the same safeguards as part of an involuntariness claim.' *Ibid.*" (395 U.S. at 221).

Here, of course, the respondent has not alleged that his confession was involuntary. Rather he seeks the benefit of the "presumption" of involuntariness that *Miranda* assumes. But *Davis* teaches that having failed to make his claim as required by the applicable

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[10] This problem may be alleviated to some extent by Rule 9(a) of the new Section 2254 rules.

rule, he is not entitled to the benefit of that presumption in a collateral attack on his conviction. Having failed to show "actual prejudice," in the sense in which *Davis* used the term, respondent is not entitled to relief from the consequences of his procedural default.

III. THE CRITICAL TEST IN DETERMINING WHETHER A HABEAS CORPUS PETITIONER SHOULD BE RELIEVED OF HIS PROCEDURAL DEFAULT IS WHETHER THE ALLEGED ERROR COULD HAVE CAUSED THE CONVICTION OF AN INNOCENT MAN

Although the Court need go no further in order to decide this case, we wish to make it clear, in light of what we have said above, that a showing of actual prejudice of the kind we have discussed is in our view a necessary but not a sufficient precondition to obtain relief from a procedural default of the kind here at issue. A showing that the confession was involuntary in the traditional sense should be accompanied by a showing that its admission may have contributed to an erroneous verdict.

All of the policy reasons outlined in *Jenkins* and discussed above for denying a defendant the benefit of the *Miranda* holding months or years after the offense has been committed and the trial has taken place apply with equal force where a defendant raises for the first time on collateral attack a claim that his confession was involuntary in fact. Because, however, the reliability of involuntary confessions is always suspect, habeas corpus relief should be available if the

admission of such an involuntary confession "could have caused the punishment of an innocent man," as was the case in *Fay* v. *Noia*, *supra*. See Friendly, *supra*, 38 U. Chi. L. Rev. at 157, n. 81. As Judge Friendly wrote (*id.* at 163–164):

> In a case where the prosecution had no other substantial evidence, as, for example, when identification testimony was weak or conflicting and there was nothing else, I would allow collateral attack regardless of what happened in the original proceedings. Such a case fits the formula that considerations of finality should not keep a possibly innocent man in jail. I would take a contrary view where the state had so much other evidence, even though some of this was obtained as a result of the confession, as to eliminate any reasonable doubt of guilt.

Here, of course, there is no claim that the confession was truly involuntary, but only that the respondent was not able to understand his *Miranda* warnings. To quote again from Judge Friendly (38 U. Chi. L. Rev. at 163):

> The mere failure to administer *Miranda* warnings in on-the-scene questioning creates little risk of unreliability, and the deterrent value of permitting collateral attack goes beyond the point of diminishing returns for the same reasons developed in Professor Amsterdam's discussion of search and seizure. I would take the same view of collateral attack based on claims of lack of full warnings or voluntary waiver with respect to station-house

> questioning where there is no indication of the use of methods that might cast doubt on the reliability of the answers.[11]

Indeed, quite apart from any question of waiver and procedural default, many of the same policies that led this Court in *Stone* v. *Powell*, *supra*, to conclude that habeas corpus should not be available to consider Fourth Amendment suppression claims when the defendant has had a full and fair opportunity to litigate those claims at trial and on direct appeal call for the conclusion that habeas corpus also ought not extend to *Miranda* claims.

The inappropriateness of extending habeas corpus to encompass *Miranda* claims such as respondent's is highlighted by the particular factual context of this case, because respondent's post-arrest statements, having not been found involuntary, would necessarily have come to the attention of the jury even if the statements had, on timely motion, been initially sup-

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[11] In *Johnson* v. *New Jersey*, *supra*, 384 U.S. at 730, the Court took a similar view regarding the relationship of *Miranda* to the reliability of the confession. There Chief Justice Warren stated: "Thus while *Escobedo* and *Miranda* guard against the possibility of unreliable statements in every instance of in-custody interrogation, they encompass situations in which the danger is not necessarily as great as when the accused is subjected to overt and obvious coercion." See also *Harris* v. *New York*, 401 U.S. 222, 224. While here the respondent was intoxicated, "it is only where the intoxication is produced by a person desirous of obtaining a confession that its trustworthiness becomes really doubtful." 3 Wigmore, *Evidence*, § 841, p. 282 (3d ed. 1940). Accordingly, there is no per se exclusionary rule based on the unreliability of statements made by one who is intoxicated. Annotation, *Confession While Intoxicated*, 69 A.L.R. 2d 361 (1960).

pressed. This is so because, quite apart from respondent's in-custody statements, the State had a very strong case that respondent could have overcome only by taking the stand and explaining his version of the shooting. But once he took the stand, his statements could have been used to challenge his credibility. *Harris* v. *New York*, 401 U.S. 222; *Oregon* v. *Hass*, 420 U.S. 714. Thus, the evidence, without the confession, showed that Willie Gilbert was shot within ten feet of the door to respondent's home with a shotgun that belonged to respondent, and it further showed that *prior* to his arrest both respondent and his wife had told the deputy sheriff that he had shot Gilbert. Moreover, no evidence was found to indicate that Gilbert was carrying any weapons at the time, and the testimony of respondent's wife was insufficient, because of her limited opportunity for observation, to show that respondent acted in self-defense.

Under these circumstances, knowing that he would have to put respondent on the stand in order to establish some defense and that the post-arrest statements could then be used to impeach respondent's credibility, respondent's counsel may simply have chosen not to make a pointless challenge to the admissibility of the post-arrest statements. We do not suggest that he did so with the thought of laying the groundwork for a collateral attack in the event of a conviction. But if the Court were now to hold that a collateral attack is proper in these circumstances, there would be no incentive whatever for a defense attorney, in a

case such as this, to raise his claim in a timely fashion. In fact, there would be considerable incentive to postpone the claim to post-conviction preceedings, thereby securing a virtually automatic second trial in the event the first trial results in conviction. This is particularly true because it would usually be difficult, if not impossible, to show that the failure to object at trial was a deliberate tactical choice.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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